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Issue Date: 15 August 2005

CASE NOS.: **2004-LHC-460**
2004-LHC-528

OWCP NOS: **07-166434**
07-165118

IN THE MATTER OF

ROOSEVELT JOHNSON,
Claimant

v.

ADM/GROWMARK RIVER SYSTEM, INC.
Employer

APPEARANCES:

Daniel E. Becnel, III, Esq.
On behalf of Claimant

Alan G. Brackett, Esq.
On behalf of Self-Insured Employer.

BEFORE: **C. RICHARD AVERY**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Roosevelt Johnson (Claimant) against ADM/Growmark River Services, Incorporated (Employer). The formal hearing was conducted in Metairie, Louisiana on April 19, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross

examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-12, and Employer's Exhibits 1-20 and 22-26. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The dates of the injuries/accidents were May 25, 2002 and March 11, 2003;
2. The injury of May 25, 2002 was in the course and scope of employment, the injury of March 11, 2003 is disputed;
3. An employer/employee relationship existed at the time of the accident;
4. Employer was advised of the injuries on May 25, 2002 and March 11, 2003;
5. Notices of controversion were filed on March 17, 2003 and April 14, 2003;
6. An informal conference was held on November 20, 2003;
7. Average weekly wage at the time of the injury was $841.22;
8. Nature and extent of disability
    (a) Temporary total disability from September 16, 2002 to October 13, 2002;
    (b) Temporary partial disability from October 14, 2002 to March 2, 2003;
    (c) Benefits were paid from September 16, 2002 to March 2, 2003: four weeks at the rate of $560.81 per week and twenty weeks at various amounts per week. The total paid was $5,540.57;
9. Permanent disability is disputed, percentage is disputed; and
10. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

1. Nature and extent of injury; and
2. Fact of accident for claimed March 11, 2003 injury.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through July 15, 2005. Employer's Post-Hearing Brief was timely filed; Claimant did not file a timely brief, nevertheless, the same was considered but Claimant's counsel's conduct will be addressed when attorney's fees are awarded.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, p.__"; and Claimant's Exhibit- "CX __, p.__".

Statement of the Evidence
Testimonial Evidence

Roosevelt Johnson

Claimant is forty-one years old. He is six feet, six inches tall and weighs 225 pounds. Claimant lives in Norco, Louisiana with his two sons. He is currently unemployed. Claimant worked for Employer for approximately eight and a half years; he began as a worker with a temporary service and was later hired on a full-time basis. Tr. 14. When employed by Employer, Claimant worked on the Mississippi River as a tractor driver. He explained that he "hooked chains to covers," raised the covers up, then drove tractors inside barges. Claimant performed other physical work if it was necessary, such as if something broke down, he would get off the tractor and assist the maintenance workers. Claimant had not filed any previous worker's compensation claims. Tr. 14.

Claimant described himself as being in "tip-top shape" before his first accident; he was never denied employment because of any physical limitation. He performed his job duties to the satisfaction of Employer and was never demoted or disciplined. Tr. 15. Claimant typically worked twelve hour shifts, four days per week, though he noted that most of his shifts were sixteen hours when overtime was included. Claimant earned fifteen dollars per hour with Employer. Tr. 16.

Claimant testified that his first work-related accident occurred on May 25, 2002. He was driving inside the barge and had to get off the tractor and unplug the silo. He used a "booster chair," a chair with cables that enables a worker to be lowered into the silo, and was using an air cable to cut a hole in the grain when the grain "broke off" and struck Claimant's knee. Tr. 17.

Claimant saw Dr. Burvant at Employer's request, and Dr. Burvant released Claimant to light duty work. Claimant said that Employer gave him the job of pressure washing, which required him to stand. Claimant underwent an arthroscopy of his left knee, and after the procedure, he requested to see a physician of his choice. Claimant saw Dr. Robert Ruel, who released him to light duty.

Claimant returned to work in February 2003. He testified that he tried full duty work pursuant to Dr. Burvant's instructions, and performed his prior work for a week or two. He said it was difficult to drive the tractor because he had to constantly push the foot pedal for two hours, which caused him pain. Claimant said he reported the difficulties performing his job to Mike Catalano. Claimant also emptied trash and cleaned up, which required him to use his legs all day. Tr. 21.

On March 11, 2003, Claimant returned to full duty, driving the tractor in the barge. He said he asked "Barry" if he could drive the "inshore side" of the barge so he would not have to climb the steps required to reach the offshore side. Claimant testified that to

enter the tractor, one must step inside the bucket where there is a step leading to the cab. He said as he stepped in on the bucket, his left leg gave out, causing him to fall backwards. He said he fell onto the steel floor that had "a little" grain on it. Tr. 22. Claimant recalled that he attempted to get up a couple of times, then George Dufrene, Jr. saw Claimant and shouted to "cut" the marine leg, which is used to scoop grain out of the barge.

Claimant said paramedics used a rescue basket to remove him from the barge. He told the paramedics that his back and side hurt. Claimant was taken to St. Charles Hospital. Claimant treated with Drs. Jaykrishnan and Moss. Claimant said Dr. Moss recommended a bone scan and MRI, which Claimant never received. Tr. 26. Following three days' bed rest ordered by Dr. Moss, Claimant returned to light duty work which involved "knocking spider webs down," dusting, sweeping floors and shoveling grain onto a conveyor belt.[3] Tr. 26. Claimant testified that he was in pain at times while performing light duty. He said he wore a back brace and took Percocet for his pain. Tr. 27.

Claimant ultimately stopped working on May 16, 2003. He said he went to work the night shift when Michael Thomas came to the door of his truck before he started working and told him that Scott Washington said to give Claimant a piece of paper and told him to leave the premises. Claimant said that Larry Campbell, a foreman, said that Employer fired Claimant because it did not believe he fell off the tractor. Tr. 27.

Claimant said Employer has not paid compensation, medical benefits, or mileage since May 16, 2003. Claimant paid for Dr. Ruel's treatment of his knee, and for treatment he received at Charity Hospital. He said that Dr. Ruel recommended that Claimant see an orthopedist for his back and sought Employer's approval but did not receive it. Dr. Ruel also recommended physical therapy which Employer did not approve. Tr. 29.

Claimant testified that he has not worked anywhere else for wages since May 16, 2003. Tr. 30. Claimant reviewed surveillance tapes of him made by Employer and explained that when his parents died, Shell Oil purchased their home and the house was demolished by Claimant's brother. Claimant said he has gone over "to mingle" and moved his brother's tractor once, but did not receive pay for doing so. Claimant said his family is visible on the film. Tr. 31.

Claimant recalled meeting with Employer's vocational rehabilitation counselor. He said he received a list of job openings the week before the hearing. Claimant said he applied for the jobs and made notations of the employers he contacted and their

[3] Claimant noted he was not paid by Employer for the three days of bed rest ordered by Dr. Moss. Tr. 25.

responses. He said that he was not offered any jobs, and some of the jobs identified were no longer available. Tr. 32.

Claimant said his left knee pain is worse since surgery was performed. He described the pain as "bone-on-bone," said the pain was sharp, and said that his knee pops frequently. Claimant takes medication every day for his pain. Tr. 34. He recalled that when he was performing light duty work, the shovel he used to shovel grain weighed between ten and fifteen pounds. He said standing up and leaning over aggravated his knee. He said Employer was aware that he was taking medication and allowed him to continue working. Claimant wants to continue treatment with Dr. Ruel and get knee surgery and an MRI and bone scan for his neck and back. Tr. 36.

On cross-examination, Claimant testified that he has an eleventh grade education and received a GED at Norco Adult School, and another at "boot camp" in Florida.[4] He said his father owned a construction company, and he worked for his father both before and after high school. When Claimant left Florida, he returned to Louisiana and worked for River Parish Maintenance before being hired by Employer.

Following Claimant's May 2002 accident, he did not miss any work until September 2002 when he had an arthroscopy performed on his knee. He was out of work for one week, during which time he received benefits from Employer. Claimant explained that he "tried" his previous job as a tractor driver a week before his claimed accident of March 11, 2003. He told Mike Catalano, the safety director, that his knee hurt, and wanted to obtain a second opinion. Tr. 40.

Claimant recalled the events of March 11, 2003, stating that he asked co-worker George Dufrene, Sr. to "cut a slope" in the grain, so he could walk down into the barge, which Mr. Dufrene, Sr. did. Tr. 42. Claimant recalled that the marine leg was operating and there was dust in the barge and on the bobcat tractor. He said he was the one who lowered the tractor into the barge by using a switch. He agreed that the safety latch is sometimes loose, but did not recall if it was loose that day; regardless, he did not hook the latch. Tr. 43

Claimant said he walked down into the barge, and the tractor was located almost in the middle of the barge. He was in the process of stepping up with his left foot into the bucket of the tractor, and his right foot was a little off the ground. He was reaching for the handles but had not grabbed them yet when all his body weight (225 pounds) on his left leg caused it to buckle. Claimant fell backwards, he guessed maybe two or three feet. Tr. 45. He said the barge was cocked up, and denied flying backwards. Claimant did not know if Mr. Dufrene, Sr. saw him or not. Tr. 47.

[4] Claimant was incarcerated in Florida for unexplained reasons. Tr. 37.

Claimant agreed that on March 24, 2003 he was operating a backhoe like the one seen in the surveillance tape. He said he was "going back and forth" on the backhoe. He explained that he was helping his cousin "throw a couple boards" in a truck, but said that his back hurt and on the tape he is visibly holding his back. Tr. 49. He said he did not do any work at the demolition site of his parents' house, he just drove around the yard. He said he also showed his sister how to move tiles. Tr. 50. Claimant said he continues to have pain in his knee, back and neck all day, every day. If he is not in too much pain, he can operate a backhoe at home. Tr. 51. Claimant denied that he gave testimony in his deposition that he walked with a limp every day. He said he never testified that he could not bend at the waist. Tr. 54.[5] Claimant admitted that he helped his sons move some furniture and that a restraining order was placed upon him by Mr. Catalano, Employer's safety manager. Tr. 58.

Claimant said he went to Wal-Mart in LaPlace, Louisiana to inquire about employment, and he also went to Conoco Foods in Harahan, Louisiana. Claimant denied working for his brother "under the table." Tr. 60.

On redirect, Claimant testified his version of events of March 11, 2003 is the same as is contained in the St. Charles Hospital emergency medical services report. He explained that the work he performed at his job was much more difficult than what he did at his family's house; there he was "just messing around." Tr. 60

Claimant said he was out of work for two years and he was only provided a list of possible job openings the week before the hearing. Claimant said he called Acme Truck Center, and spoke to Mr. Floyd who informed Claimant no job was available. He said that Dollar Value, Premiere Cleaners, Family Thrift Center, and Saturn of Metairie all informed him that there were no available positions. Claimant said he spoke with Nicole at Treasure Chest Casino who told him he had to apply for a position online, and Julie at the Marriott Hotel indicated that the loss prevention officer position may be available. Tr. 61. Claimant said he complained of a rib injury in his March 2003 accident, and that he had never had a fractured rib before or ever suffered a fall. Tr. 63.

Larry Stokes, Ph.D.

Dr. Stokes, a vocational rehabilitation specialist, was asked by Employer to evaluate Claimant's employment opportunities. He testified that he saw Claimant on March 7, 2005, when he interviewed Claimant for one and a half to two hours. He also administered vocational tests and reviewed Claimant's medical records. Dr. Stokes issued a report on March 230, 2005 which included a vocational analysis and labor market research. Tr. 66-67; EX 24. On April 13, 2005, Dr. Stokes sent correspondence to Claimant's attorney and to his physicians regarding the jobs he identified. Tr. 68.

[5] Claimant's deposition was not submitted into evidence by the parties.

Dr. Stokes' report, located at Employer's Exhibit 24, addresses Claimant's background information, work history, and medical history. He indicated that Drs. Moss and Ruel determined Claimant was capable of performing light duty; Dr. Burvant released him without restrictions and Dr. Jayakrishnan deemed Claimant capable of medium duty. Dr. Stokes believed Claimant's vocational prognosis to be excellent.

On April 13, 2005, Dr. Stokes notified Claimant of possible employment opportunities. The letter contains the names of nine potential employers and their available positions, including: Dispatcher at Acme Truck Line in Belle Chasse; Loss Prevention Officer at Marriott Hotel in New Orleans; Cashier at Dollar Value in Metairie; Production Worker at Premier Cleaners in Metairie; Custodian at Treasure Chest Casino in Kenner; Porter/Car Washer at Saturn of Metairie; Pricer at Family Thrift Saver in Metairie; Service Writer at Wal-Mart in LaPlace, and Valet/attendant at Boomtown Casino in Harvey. EX 21.

Dr. Stokes was aware that Dr. Burvant determined that Claimant was capable of returning to work in 2003; Dr. Stokes opined that as a result, Claimant would not have a problem performing his original job (aside from his termination) and therefore would suffer no loss of wage earning capacity. Tr. 68. Dr. Stokes opined that Claimant was employable retroactively to when Dr. Burvant released him to full duty. Tr. 76.

Dr. Stokes personally contacted the potential employers with whom he identified possible job openings. He recontacted all of the employers the day before the hearing and learned that Acme had a full-time opening. Marriott had no opening because it had already hired but was accepting applications for positions which fit Claimant's profile, including laundry sorter, painter, store room attendant and kitchen worker positions. Dollar Value indicated it had several openings, and Premiere Cleaners had a bagger and ticketer position. Tr. 73-74.

Treasure Chest Casino had several custodial openings and informed Dr. Stokes that applicants could apply online or use the jobline to apply over the telephone. Saturn of Metairie did not have any openings, though it had previously. Family Thrift Center had previous openings but none at that time. Wal-Mart informed Dr. Stokes it had filled the open position one month earlier. Boomtown Casino did not return Dr. Stokes' call. Tr. 75.

On cross-examination, Dr. Stokes agreed he was aware that Dr. Burvant had not seen Claimant following the alleged accident of March 11, 2003. He agreed that Dr. Burvant released Claimant to work on February 24, 2003, and again later based upon his review of the surveillance footage taken of Claimant following the March 11, 2003 incident. Tr. 78.

Dr. Stokes was shown a report from Dr. Burvant dated April 11, 2005, and stated he had not previously seen it. He agreed that he did not perform a retroactive labor market survey for 2003, but he said that the same jobs with the same requirements were available in 2003. He conceded he did not contact the employers as he did the day before the hearing and inquire regarding the availability of positions in 2003. Tr. 82.

Dr. Stokes said he reviewed the records from Charity Hospital and referenced a December 2, 2004 report by Dr. Nicola Corbett at page 6 of his report as well as in his "overall impressions." He said that Dr. Corbett's report did not state anything with specificity regarding Claimant's physical or functional limitations that affect his employability, where every other physician commented on his physical capacities. Tr. 89.

On redirect, Dr. Stokes was allowed to read Dr. Burvant's April 11, 2005 report and stated it did not indicate anything impacting Claimant's employability or work restrictions. He said Dr. Burvant's report did not change his opinion. Tr. 90. On recross, Dr. Stokes acknowledged that the report indicated that Claimant had instability, bursitis and arthritis in his leg and would benefit from aggressive therapy and injections, but he said that Dr. Burvant made no mention of restrictions or limitations. Tr. 91-92.

Debbie Stafford

Ms. Stafford is a senior claims adjuster in Employer's compensation department. She testified that she handled both of Claimant's claims. Tr. 93. Ms. Stafford said that she never received a permanent partial disability rating on Claimant. She spoke with Claimant regarding his return to work in March 2003. She testified that Claimant said if he returned to work he was sure he would have another accident. Tr. 94.

On cross-examination, Ms. Stafford conceded that she did not have any documentation of Claimant's statement, she did not make any notation or written sworn statement regarding the conversation, nor did she tell Employer what Claimant said. Tr. 95. Ms. Stafford said she was aware that Dr. Ruel requested approval of Synvisc injections in January 2004. She said she denied the injections because Claimant was released to full duty "a couple" of years prior to the request, and she had no knowledge of his activities or whereabouts in the interim, so she could not justify the request. Ms. Stafford then agreed that she misspoke, and testified that Claimant was released to work nine months before the injections were requested. Tr. 96.

Ms. Stafford was aware that on December 20, 2004, Dr. Ruel requested another "arthroscopic look" into Claimant's knee. The request was not approved. Tr. 98. She was aware that Dr. Moss recommended a bone scan, an MRI and physical therapy, which she did not approve. She said at the time of the hearing, she would not allow Claimant to return to Dr. Ruel to obtain a permanent impairment rating. Tr. 100.

Ms. Stafford was aware that Claimant was taking medication when he returned to work. She said between March 2003 and April 2005, she had no other medical reports to base her decision on aside from Drs. Moss and Ruel, and the notes from Charity Hospital, and conceded that she did not follow those recommendations. Tr. 101.

Gregory Dufrene, Sr.

Mr. Dufrene testified that he has worked for Employer for thirty-two and a half years. He currently serves as the outside supervisor, but in March 2003 he was the grain leg operator, leaderman, which he did for ten to fifteen years. Tr. 102-103. Mr. Dufrene explained that a marine leg has buckets on it which are used to remove grain from barges. The operator works from the top of the control cab, approximately thirty to forty feet up. Tr. 103.

Mr. Dufrene was working on March 11, 2003, the date Claimant claims he was injured. Mr. Dufrene recalled that he and Claimant came on shift together that day. Mr. Dufrene immediately went to his cab. Claimant had to lower the tractor into the barge using a crane. Mr. Dufrene watched the tractor being lowered and did not see a chain break off. Tr. 104. Claimant then climbed down the ramp that Mr. Dufrene cut for him. After cutting a slope in the grain, the marine leg is moved to the opposite side of the barge, which "takes a minute or so" to do. Tr. 106. Mr. Dufrene said while he was moving the leg, he did not see what Claimant was doing, and when he got the marine leg to the other side of the barge, he saw Claimant lying on the ground. Tr. 107.

Mr. Dufrene identified photographs found at Employer's Exhibit 10 as demonstrating "about" where Claimant was when he spied him on the ground. Mr. Dufrene testified that Claimant was the only person in the barge at the time, and there were not many footprints around Claimant when Mr. Dufrene first saw him. Mr. Dufrene estimated that three to four inches of grain was on the floor. He agreed that if a person walks from the grain into the tractor bucket, footprints should be left due to the grain dust present in the barge. Tr. 107-108. Mr. Dufrene identified photographs found at Employer's Exhibits 25 and 26 as the bucket of Claimant's tractor. He said it appeared that the footprints in the bucket were facing sideways. Tr. 109.

Mr. Dufrene could not tell from the cab of the marine arm whether the safety latch on the crane was in working order, but said no one told him there was anything wrong with it that day. When he saw Claimant, Mr. Dufrene called his son over and told him Claimant was down. Mr. Dufrene also called the control room. He stopped the barge and stayed in the cab. Tr. 111. Mr. Dufrene identified a photograph contained in Employer's Exhibit 10 as the hoist used to put the tractor in the barge. He agreed that the hoist should have been hooked into a ring by Claimant before he tried to get in the cab. Tr. 112. Mr. Dufrene estimated that the barge was at approximately a twenty degree angle. He could not recall anyone trying to get in a tractor, falling, and ending up several feet away on his back. Tr. 113.

On cross-examination, Mr. Dufrene testified that Claimant was a "pretty good" worker and did everything Mr. Dufrene told him to. He never reprimanded or disciplined Claimant, and never witnessed him have an accident before. Mr. Dufrene said that the shackle on the hook that connects the trailer has been missing, usually when the safety latch comes off. Tr. 113. He did not know whether James Martin put wire on the shackle to get Claimant out of the hold. Mr. Dufrene did not know where the footprints on the bucket of the tractor came from, and agreed that they could have been there from the previous day. He never went to Claimant to ask him what happened. He was aware Claimant had previously injured his knee, and he saw Claimant's knee give him trouble when he returned to work, but said Claimant had continued to perform his job. Tr. 115.

Gary Naquin, Sr.

Mr. Naquin worked for Employer for thirty-two and a half years. He currently serves as Employer's regional safety and health coordinator, a position he has held for approximately twenty years. Tr. 117. Mr. Naquin first heard about Claimant's March 11, 2003 claim from Mike Catalano, who conducted the investigation of Claimant's claim. Mr. Naquin reviewed Mr. Catalano's reports regarding Claimant's claim.[6]

Mr. Naquin identified a diagram found at Employer's Exhibit 12 as a diagram representing the measurements of the Mustang tractor Claimant said was involved in his accident. The diagram indicates that from the edge of the bucket to the handhold is forty-three inches, from the front of the bucket to the stern is seventeen inches, the bucket is twenty-nine inches high and contains a seventeen inch high step. Tr. 119; EX 12. Mr. Naquin explained the proper procedure for entering a tractor as walking into the bucket, grabbing a handhold, and then climbing up. Employer's employees are given on-the-job training regarding this procedure. Mr. Naquin said Claimant was properly trained. Tr. 119-120. Mr. Naquin said photos at Employer's Exhibit 11 demonstrate both a six-foot tall worker and a five-foot tall worker utilizing the proper procedure for entering a tractor. Tr. 120; EX 11.

Mr. Naquin said the pictures of Claimant lying on the grain on the floor of the barge, found at Employer's Exhibit 10, were taken as part of the internal investigation of Claimant's claim. Mr. Naquin estimated the photos to have been taken approximately five to ten minutes after Claimant fell. Tr. 121. Mr. Naquin said he has had knee surgery too, and if his knee gives out, he crumples as opposed to falling backwards. Tr. 122.

Regarding the photos of the bucket of the tractor, Mr. Naquin said it appeared that the footprints in the bucket were "going left to right" with one facing out toward Claimant. He did not see any footprints on the step inside the bucket, nor did he see any footprints leading to the step inside the bucket. Tr. 124-125. Mr. Naquin said while

[6] Mr. Catalano was not present at the hearing due to the aforementioned restraining order.

Claimant was employed by Employer, Mr. Naquin spoke with him about doing some outside work for him. Mr. Naquin recalled Claimant did odds and ends, labor-type work. Tr. 125.

On cross-examination, Mr. Naquin testified that he did not know if the footprints in the photos were Claimant's. He opined the footprints were fresh, and said that if someone had been on the step, there would have been grain "all over that bucket." Tr. 126. Mr. Naquin did not personally train employees how to enter the tractors.

Mr. Naquin was shown Claimant's Exhibit 12, the minutes from a safety meeting on March 24, 2003. He agreed that one of the new items was listed as "tractor mounting illustration," and agreed that Claimant's name was listed under accidents. He agreed that it was reasonable to assume that one of the new items involved how to enter the trailer because Claimant fell off, but explained that any incident that occurs between monthly meetings is discussed. Mr. Naquin acknowledged that he hired Claimant for Employer when Claimant was working for temporary services. Tr. 132.

On redirect, Mr. Naquin clarified that Claimant's name on the meeting minutes indicates only that he reported an accident. He said that training on entering tractors was discussed, which does not mean anything was implemented.[7]

Sherman Cravins

Mr. Cravins testified that he is employed by Southern Surveillance Company. He identified Employer's Exhibit 17 as the reports he prepared in connection with surveillance activities of Claimant. Tr. 134. Mr. Cravins testified that he actually shot the video tape and prepared the reports; he did not alter the videos. Tr. 136. Mr. Cravins said he saw Claimant using construction and welding equipment. He said Claimant primarily worked alone. He also viewed Claimant walking normally without a limp. Mr. Cravins said the videos show Claimant working throughout his neighborhood at several locations performing demolition work. Tr. 137. He said Claimant was also observed handling large ramps on a commercial vehicle and operating a backhoe. Tr. 138.

On cross-examination, Mr. Cravins agreed that the trailer was outside of Claimant's residence. He explained that the other houses were being demolished so they did not have physical addresses. Mr. Cravins said he did not bring invoices to the hearing which reflected how many total hours he spent on Claimant's case. Tr. 139. He said he started surveillance on March 24, 2003. He tries to work on all his cases within seven days of assignment, so he could assume that he was hired the week of March 17, 2003. Tr. 140.

[7] The parties stipulated that David Burgbacher, another of Employer's safety professionals, would have testified to the same information that Mr. Naquin did. Tr. 133.

Medical Evidence

John G. Burvant, M.D.

Dr. Burvant initially saw Claimant on June 24, 2002, where he noted Claimant had been "struck in the left knee by a large bag of solid grain" on May 25, 2002. EX 13, p. 1. Claimant continued to work but reported difficulty climbing ladders, and said his knee gave out on occasions. On physical examination, Dr. Burvant noted moderate effusion of the left knee and significant crepitus of the patellofemoral joint. Dr. Burvant ordered x-rays of the knee which showed no abnormalities. His impression was blunt trauma to the knee, possible chondral injury of the patellofemoral joint. Dr. Burvant referred Claimant for an MRI and allowed him to continue driving, but limited Claimant's ability to climb stairs. EX 13, p.1.

On September 16, 2002, Dr. Burvant performed a diagnostic arthroscopy, debridement of the medial femoral condolyte with multiple drilling, and debridement and chrondoplasty of the patella and intertrochlear groove. EX 13, p. 2. Dr. Burvant released Claimant to medium work. EX 13, p. 3. Dr. Burvant referred Claimant to physical therapy at Performance Physical Therapy. EX 15. Claimant was seen for a physical therapy assessment on October 24, 2002. On November 1, 2002, Claimant had attended six physical therapy sessions and had demonstrated gains in range of motion, improved gait mechanisms, strength and tolerance to weight bearing activities. EX 15, p. 2. On December 4, 2002, Claimant had attended a total of nineteen visits and he demonstrated an ability to perform activities such as sweeping, shoveling, alternate standing and walking and waist to shoulder lifting, but still had difficulty with stairs and squatting. EX 15, p. 6.

Claimant saw Dr. Burvant again on January 13, 2003, where Dr. Burvant noted Claimant underwent an FCE which indicated he should be kept at medium level duty though he would ultimately be able to return to his regular duties. EX 14. An MRI of Claimant's left knee was performed on February 18, 2003. The impression was bruised bone of the medial femoral condyle, osteochondral defect of the medial femoral condyle, postulated large cartilaginous excoriations of the medial femoral condyle, articular surface, subtle rent of the medial meniscus, and small knee effusion without popliteal cyst formation. EX 13, pp.4-5. Claimant saw Dr. Burvant on February 24, 2003, where Dr. Burvant noted no effusion and full range of motion. Dr. Burvant indicated that there was nothing on Claimant's recent MRI that was inconsistent with his condition at the time of surgery. Claimant said he was willing to try returning to full duty. EX 13, p. 6. Dr. Burvant released Claimant to regular duty effective March 3, 2003. EX 13, p. 7.

Claimant returned on March 10, 2003 complaining of sharp pain in his medial knee on occasion. He indicated he could not return to his regular job duties because of his knee, and reported no significant improvement. Dr. Burvant opined that Claimant was likely at maximum medical improvement and stated that based on the FCE and

current findings, he saw no reason Claimant could not return to his regular duties. He explained to Claimant that he did not have any additional treatment or recommendation to offer him. EX 13, p. 10.

Dr. Burvant authored correspondence on May 12, 2003 indicating he viewed surveillance films taken of Claimant. He stated he saw Claimant climbing in and out of a backhoe and loading large pieces of wood from the ground into a stack. Dr. Burvant opined that Claimant showed no distress in performing those activities, which was not consistent with the complaints he made to Dr. Burvant. He saw no reason to place any restrictions on Claimant's activities, based on the films. EX 13, p. 8.

On April 11, 2005, Dr. Burvant wrote a letter to Employer's counsel indicating that Claimant, who he had not seen in over two years, returned to his office complaining of continuing knee pain. Claimant indicated he had pain in the medial knee joint and noticed frequent popping. Claimant reported he had received treatment at Charity Hospital and from Dr. Ruel. On physical exam, Dr. Burvant noted a mild varus alignment of the knee, some tenderness of the medial joint and some palpable spurring. He noted significant quadriceps atrophy in comparison to the other leg. An x-ray showed some decrease of the medial joint space. Dr. Burvant's impression was anserine bursitis and medial joint arthritis. He opined that Claimant's instability was likely related to the significant quadriceps weakness. Dr. Burvant stated that though a second look arthroscopy may have been diagnostic, he did not believe there was much therapeutic value to it. He determined that Claimant needed aggressive rehabilitation for strengthening of his knee, which he believed would eliminate Claimant's instability. He said Claimant could also benefit from injections into the bursa, and said the need for an osteotomy would be determined after adequate rehabilitation. CX 11.[8]

St. Charles Parish Hospital

Claimant was taken to St. Charles Parish Hospital on March 11, 2003 following his second alleged accident. The Emergency Medical Service report indicates that Claimant was climbing "on top of the bucket" of a tractor when "he got weak and his hand slipped," causing him to fall backwards two and a half to three feet. The report noted that Claimant landed on his back in approximately three to four inches of grain. Claimant complained of back pain and was taken out of the barge by a crane. The emergency department notes indicate that Claimant fell between three to six feet and complained of back pain, and on exam he was tender over the right rib area. X-rays were taken of Claimant's pelvis, lumbosacral spine, and left knee; all produced normal results.

[8] Claimant's exhibits do not contain page numbers. When a specific page number is referenced in the discussion, reference is to what I have determined to be the page numbers; however, I have not page numbered all of Claimant's exhibits.

At discharge, Claimant was "up and walking," and "ready to go." He was prescribed Percocet and instructed to follow up with a physician in one to two days. CX 3.[9]

C.J. Jayakrishnan, M.D.

On March 14, 2003, Dr. Jayakrishnan ordered two days' bed rest for Claimant and indicated that he could return to work on March 17, 2003. CX 3. On March 28, 2003, Dr. Jayakrishnan released Claimant to light duty and ordered that he do "no lifting, no pulling, no climbing and no barges." CX 2, p. 8. Duplicate copies of what appears to be an invoice indicate that on April 11, 2003, Dr. Jayakrishnan diagnosed Claimant with contusion of the ribs and a lumbar strain. CX 2, pp. 6- 7. On March 28, 2003, Dr. Jayakrishnan did not complete a physical capacities checklist, but made a notation on the form that Claimant was referred to orthopedics and Dr. Jayakrishnan would defer a disability determination to an orthopedist. CX 2, p. 2.[10]

J. Lee Moss, M.D.

Dr. Moss is an orthopedist who saw Claimant for an initial evaluation on May 9, 2003, where Claimant complained of neck pain and lower back pain. CX 6, p. 2. Dr. Moss ordered MRIs and x-rays of the cervical and lumbar spine, and deferred his treatment plan until the results were obtained. He felt it was safe for Claimant to continue working light duty. CX 6, p. 1. His diagnosis of Claimant was "HNP cervical lumbar." CX 6, p. 2.[11]

Robert E. Ruel, Jr., M.D.

Dr. Ruel, an orthopedist, issued a report on March 21, 2003, after Claimant visited his office on March 20, complaining of stiffness in his left knee with pain under the kneecap. He also complained of his knee giving way on occasion and said one such incident occurred at work on March 11, causing him to fracture a rib on the right and injure his neck and back. CX 1, p. 7. Dr. Ruel reviewed Claimant's medical records and completed a physical examination where he noted visible atrophy of the left quadriceps, no swelling in the knee, and no palpable effusion or heat in the knee. Dr. Ruel opined that Claimant appeared somewhat overprotective of his left knee, and throughout the exam of his left knee he reacted as if in pain in his right ribs. Dr. Ruel did not further question Claimant about his ribs since he was seeing another physician for his ribs, neck and back complaints. CX 1, p. 8.

Dr. Ruel opined that Claimant sustained significant articular injury as described by Dr. Burvant. He noted that Claimant received appropriate treatment from Dr. Burvant.

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[9] Some of Claimant's exhibits are misnumbered; for example, Exhibit 2 is listed as Dr. Jayakrishnan's records but one of those records is contained in Exhibit 3.

[10] The only other records of Dr. Jayakrishnan's that were submitted are health insurance claim forms which indicate that Claimant saw Dr. Jayakrishnan on March 14, 2003 and March 28, 2003. CX 2, pp. 4-5. There are no written records indicating what, if any treatment was provided.

[11] HNP is an abbreviation for herniated nucleus pulposus.

Dr. Ruel believed that Claimant's injury was significant to the articular surface of his joint and there was no way to know what the eventual outcome would be, but said Claimant would definitely develop traumatic arthrosis. He said it may be necessary in the future to have a second arthroscopic look at the knee, but in the meantime, "the only reasonable thing to do" was keep Claimant's restrictions as outlined by Dr, Burvant on January 13, 2003, namely, no barges, occasional stairs, no ladders, no lifting over thirty to sixty pounds, restrict lifting from the ground to thirty to forty pounds, and he was able to work as a sweeper. He opined that the restrictions may be permanent. CX 1, p. 9. Dr. Ruel recommended Claimant continue taking Celebrex and continue to exercise his left quadriceps to gain further strength. CX 1, p. 10.

Dr. Ruel issued another report on January 28, 2004, after Claimant returned for a visit on January 27 and stated he felt his left knee was getting worse. Claimant reported that he had such knee pain on January 5 that he went to the emergency room at Charity Hospital where he was given Flexeril and Naprosyn. Claimant reported to Dr. Ruel that he felt something was moving deep in his knee. Dr. Ruel opined that a second arthroscopic look at Claimant's knee was indicated for diagnostic purposes as well as therapeutic purposes, and said Synvisc injections were another consideration in an attempt to relieve Claimant's symptoms. CX 1. pp. 5-6.

Claimant apparently retuned to see Dr. Ruel on June 21, 2004, where he complained of continued left knee discomfort, his knee giving way, and sharp pain in the medial aspect of his knee with certain movements. The note indicated that Claimant's job was terminated in May 2003 and he was not working. He was taking Naproxen and Flexeril, and receiving treatment at LSU Medical Center. CX 1, p. 14.[12]

On December 20, 2004, Claimant saw Dr. Ruel and reported continued medial aspect left knee discomfort. He indicated that his knee popped in the morning when he first stood on it, it continued to give way and cause him sharp pain. He reported his knee was tender to the touch and said the physician at the Charity clinic had him in therapy. Dr. Ruel did not believe osteotomy was indicated but a second arthroscopic look was indicated. CX 1, p. 3. A prescription signed by Dr. Ruel on January 26, 2005 states "occasional bicycle riding is okay." CX 1, p. 1.

The Medical Center of Louisiana at New Orleans (Charity Hospital)

Claimant received physical therapy at Charity and also made several visits to the emergency room and the orthopedic clinic. His first visit to the emergency room appears to have occurred on January 1, 2004, where he was diagnosed with knee pain and cervical strain. He was prescribed Ibuprofen and referred to the orthopedic clinic. On

[12] This note is handwritten and the majority of it is illegible. What is obviously legible has been included in the discussion above.

January 5, Claimant was prescribed Naprosyn and Flexeril Claimant participated in physical therapy from March 5, 2004 through January 6, 2005. CX 7.[13]

On January 5, 2004, Claimant had a normal cervical spine film and a film of the left knee showed narrowing of the medial compartment, otherwise an unremarkable exam. Claimant's physical therapy notes indicate that orthopedics did not recommend knee surgery at that time; Claimant would be reevaluated in February 2005. Claimant had a cervical spine film taken on February 2, 2004 which revealed a small amount of narrowing at the C4-C5 intervertebral disc space. Alignment of the cervical spine was normal, no fractures or dislocations were identified, mineralization and alignment appeared normal, and soft tissues were unremarkable. Films were also taken of Claimant's left knee which showed narrowing of the medial compartment and osteophyte formation. No fractures or dislocations were identified, mineralization and alignment appeared normal, and soft tissues were unremarkable. CX 7.

Other Evidence

Claimant's Exhibit 8 contains receipts for prescriptions of Ibuprofen totaling $24.27, $84.26 for Flexeril; $18.03 for Percocet; $23.39 for Naproxen. Claimant's Exhibit 9 consists of his mileage records for trips from his home to Dr. Moss and Charity Hospital from March 2003 to June 2004, totaling 3,488.6 miles. Claimant also submitted parking receipts he incurred during visits to Charity, totaling $13.00, and fees he incurred associated with copying his records totaling $59.33.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

[13] The notes from Charity are entirely handwritten and many are illegible.

The Parties' Contentions

Claimant, through counsel, asserts that regarding his May 25, 2002 injury, he has not reached maximum medical improvement or received a permanent partial disability rating; rather, he points to Dr. Burvant's most recent report of April 2005 indicating that he needs physical therapy. He asserts that both Drs. Moss and Ruel have placed Claimant at light duty work status and claims he is entitled to see the orthopedist of his choice, Dr. Ruel, for treatment as well as an MMI or permanent disability rating.

Employer, on the other hand, asserts that as regards his May 25, 2002 injury, Claimant has reached MMI as determined by Dr. Burvant, who treated him exclusively for that injury. Employer contends that because Claimant reached MMI and was released to his full duties, he is not entitled to any further indemnity or medical benefits related to the May 2002 accident.

Regarding the incident of March 11, 2003, Claimant asserts that he established a *prima facie* case of accident/injury, as established by his testimony and the medical evidence of record, which cannot be rebutted by Employer. Claimant contends he is entitled to the medical treatment provided by Drs. Ruel, Moss and Charity Hospital, as well as diagnostic tests and procedures. Further, Claimant asserts he is entitled to compensation from his last day of work until he is able to return to full duty or is given a permanent disability rating.

Employer argues that the incident of March 11, 2003 is a fabricated claim. Employer claims that if Claimant has any medical ailments, they were not caused by Claimant's work, rather, they could have been caused by the activities in which he engaged in on the surveillance tapes. Employer contends that Claimant cannot establish a *prima facie* case, but, assuming he can, Employer rebuts the claim with the fruits of its investigation. Employer asserts that Claimant has suffered no loss of wage earning capacity and is entitled to no additional benefits, because he has been fully compensated for his claim.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary. 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the present case, the parties agree that Claimant suffered an injury to his left knee at work on May 25, 2002. The parties disagree regarding the claimed accident of March 11, 2003. Regarding the latter, however, I find that Claimant invokes the Section 20(a) presumption: he complained of pain in his back, neck and side, which complaints are reflected in the medical evidence of record. At St. Charles Parish Hospital, Claimant's condition was diagnosed as back strain. When he followed up with Dr. Jaykrishnan two days later, Dr. Jaykrishnan ordered two days of bed rest and noted Claimant's condition as contusion of the ribs and lumbar strain.

Regarding causation, Claimant testified that his leg gave out while stepping into the bucket of the tractor. He had complained of his knee giving out in the past, and the method of entering the tractor is a step inside the bucket. Employer's photographs show that Claimant was found lying on the floor of the barge, as he testified happened. There were no eyewitnesses to dispute his version of the accident, and until that occasion, Claimant had been for over eight years a good employee. Also, he is a large person and it is plausible that his weakened knee failed him while mounting the tractor. Therefore, because Claimant demonstrated that he suffered a harm and that working conditions existed which could have caused the harm, I find Claimant has invoked the Section 20(a) presumption.

Because Claimant invoked the presumption, Employer must rebut the presumption with substantial evidence to the contrary. Employer asserts that it rebuts the presumption by introducing results of the investigation it undertook in response to Claimant's claimed accident, and documentation which establishes inconsistencies in Claimant's testimony, deposition testimony, and the history he relayed to treating physicians. Employer's Post-Hearing Brief, p. 10.

I do not find Employer's evidence to be substantial enough to sever the causal relation between Claimant's injury and his employment. Employer has produced photographs of the alleged accident scene which show Claimant to be in the position he claimed. There were no witnesses to the actual accident, though Mr. Dufrene testified that he saw Claimant lying on the floor. There is no medical evidence of record to contradict the findings of St. Charles Parish Hospital or Dr. Jayakrishnan; and

Employer's surveillance tapes do not establish that Claimant was engaging in any activity prior to the date of the accident which could have caused the pain he complained of. Therefore, I find that Employer has not rebutted the Section 20(a) presumption, and, as a result, Claimant benefits from the presumption that his March 11, 2003 accident was causally related to his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). The mere possibility of future surgery does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986).

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

Claimant's May 25, 2002 Injury

In this case, Dr. Burvant was the only physician to express an opinion about MMI regarding Claimant's knee. On March 10, 2003, Dr. Burvant indicated that Claimant had probably reached MMI with regard to his left knee, but I am distrustful of that statement because Claimant continued to have complaints of left knee pain and instability and both Drs. Burvant and Ruel later recommended further treatment.

Claimant was released to light duty by Dr. Burvant on June 24, 2003. EX 13, p. 1. On September 16, 2003, an arthroscopy was performed. EX 13, p. 2. On January 13, 2003, based on the results of an FCE, Dr. Burvant determined that Claimant was capable of returning to medium duty with restrictions, including no barges, occasional stairs, no ladders, and lifting restrictions. EX 13, p. 3. On February 24, 2003, considering the MRI and Claimant's willingness to attempt regular duty, Dr. Burvant released Claimant to regular duty, without restrictions, effective March 3, 2003. EX 13, p. 7. On March 10, 2003, Claimant complained of difficulty performing his regular duties, yet Dr. Burvant opined that based on the FCE and current findings, there was no reason Claimant could not perform his regular duties. Claimant thereafter returned to his regular duties, but the next day Claimant's knee failed him and he had his second accident. Subsequent to that event, Claimant placed himself under the care of Dr. Ruel who adopted Dr. Burvant's January 13, 2003 restrictions as perhaps permanent, and later opined a second arthroscopic look was indicated. In fact, even Dr. Burvant, upon seeing the Claimant two years later, found quadriceps atrophy and instability requiring the need for injections and aggressive rehabilitation.

In sum, inasmuch as there has been no recommended medical treatment approved for Claimant's left knee since 2003,[14] and since he apparently is still in need of such treatment, I find that Claimant has not reached MMI regarding that injury. I also find that because of the January 13, 2003 restrictions placed on Claimant by Dr. Burvant and subsequently adopted by Dr. Ruel, as well as the restriction of light duty established by Dr. Moss, that Claimant is not capable of returning to his previous employment and the burden of establishing suitable alternative employment has shifted to Employer.

Claimant's March 11, 2003 Injury

Dr. Jaykrishnan deferred an opinion on Claimant's status to an orthopedist, and Dr. Moss's request for an MRI and a bone scan of Claimant's neck and back were denied. Dr. Ruel examined Claimant with regard to his knee on March 20, 2003, and adopted Dr. Burvant's medium work restrictions including no barges, occasional stairs, no ladders, no lifting over thirty to sixty pounds, restricted lifting from ground level to thirty to forty pounds, and noted Claimant was able to perform work as a sweeper, but recommended Claimant see an orthopedist. CX 1, p. 9. Dr. Moss, an orthopedist, determined on May 9, 2003, that it was "safe" for Claimant to continue working light duty. CX 6, p. 1. On

[14] A fact Ms. Stafford, the claims adjuster, acknowledged in her testimony.

May 12, 2003, after viewing the surveillance video of Claimant, but not physically examining him, Dr. Burvant opined Claimant was capable of working without restriction. EX 13, p. 8. Dr. Burvant was the only physician who opined Claimant is capable of working without restriction following the second accident, and I do not accept his opinion in view of the other physicians who did later examine Claimant, as well as Claimant's own testimony.

Consequently, because Claimant has not been provided the diagnostic treatment recommended by Dr. Moss following the second accident, and since Claimant still complains of neck and back pain which remains unresolved, I find that as to this injury also, Claimant has not reached MMI.

Suitable Alternative Employer

Claimant was terminated by Employer on May 16, 2003, allegedly for reporting a false accident. There is no doubt that Claimant is capable of working; every physician who has treated him has deemed him capable of performing work at some level. Following his March 11, 2003 accident, Claimant continued to work for Employer on a light duty basis until he was terminated. Employer asserts that Claimant is seen on the surveillance tapes driving a backhoe, but Claimant testified that he is able to perform that activity at home but is uncertain if he can do so on the job. I do not think that Employer's surveillance tapes establish that Claimant is capable of returning to his previous occupation as a tractor driver/cover handler 12 hours per day. Therefore, as previously found, Employer must establish the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish

total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

Dr. Stokes issued a thorough report, conducted labor market research, and performed a labor market survey. He considered Claimant's background, work history, and extensive medical record, as well as recommendations made by physicians who treated Claimant. Dr. Stokes compiled a representative sample of jobs available in Claimant's market area. The list is entitled "Alternate Employment" and contains nine occupations, their physical demand levels, number of average annual openings, weekly wage range, and average weekly wage, for example: Courier/Messenger, sedentary to light, 30 average openings, $269.20-$345.20, average weekly wage $330.80. EX 24, p. 10.

Dr. Stokes then proceeded to conduct labor market research for Claimant, he identified nine specific jobs and provided the job title and company contact information, for example, Dispatcher, Acme Truck Lines, Inc. He stated in his report that the weekly wages for the positions "range from $240.80 to $868.40 per week, with average weekly wages ranging from $265.60 to $626.40 per week." EX 24, p. 11. Also, while Dr. Stokes testified that he did not perform a retroactive labor market survey, he knew from his job bank listings that the same positions were available and cited Acme Truck Lines, Inc. as an example, stating that it was hiring on November 6, 2003 and paid an hourly wage of $9.20 to $11.68 per hour.

As detailed in his testimony, Dr. Stokes, after interviewing and testing Claimant and reviewing the medical records, limited his labor market research to sedentary, light, and medium work, and his report sets out the jobs available in each category. Consequently, since the last opinion expressed by a physician is that of Dr. Moss on May 9, 2003, who opined Claimant could continue with light work,[15] I feel constrained to accept from Dr. Stokes' report only the jobs identified in that range with wages of $246.40 to $542.00 per week. These jobs include courier/messenger, stock clerk, parts salesperson, rental clerk, parking lot attendant, and security guard (EX 24, p. 10), all of which Dr. Stokes testified he believed to be suitable alternative positions for Claimant "in light duty capacities." Tr. 69. Accepting these jobs as such and averaging the salaries, I find, as of March 30, 2005, Employer has demonstrated that Claimant is capable of earning $395.00 per week.[16]

[15] On March 12, 2003, Dr. Burvant, following his viewing of the videotapes, placed no restrictions on Claimant but on March 21, 2003, Dr. Ruel adopted Dr. Burvant's earlier restrictions regarding Claimant's knee, and on May 9, 2003, the orthopedist, Dr. Moss, who examined Claimant's back, said Claimant could continue light duty.

[16] While I believe Claimant was capable of light duty employment at the time Employer terminated him, inasmuch as job surveys were not performed until 2005, I find Employer did not carry its burden until that time.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

In this case, Employer ceased paying medical expenses for Claimant effective May 16, 2003. However, because Claimant's May 2002 knee injury was work-related, Employer is responsible for continued medical care provided to Claimant, including the treatment provided by Dr. Ruel, Charity Hospital and the subsequent treatment recommended by Dr. Burvant in his April 11, 2005 report, namely, aggressive rehabilitation and possibly injections into the bursa. CX 11. Likewise, as to the March 13, 2003 accident, Claimant demonstrated injury from that event too and is entitled to reasonable and necessary medical expenses in regard to that event also, including the treatment provided by Charity Hospital, Dr. Jayakrishnan, and Dr. Moss, as well as the tests Dr. Moss ordered.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid timely compensation for Claimant's first injury and timely controverted the second injury. Therefore, no Section 14(e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for temporary total disability from May 16, 2003, the last day of employment before he was terminated, until March 30, 2005, based on an average weekly wage of $841.22;

(2) Employer shall pay to Claimant compensation for temporary partial disability from March 30, 2005 and continuing based on an average weekly wage of $841.22 and reduced by a residual wage earning capacity of $375.25 per week;[17]

(3) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's May 25, 2002 and March 11, 2003 injuries;

(4) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 15th day of August, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd

[17] Mindful of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, Claimant's wages are adjusted to reflect their actual value at the time of Claimant's March 2003 injury. The National Average Weekly Wage (NAWW) for March 2003 was $498.27, and the NAWW for March 2005 was $523.58. Thus, the 2003 NAWW was approximately 95% of the 2005 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $375.25 per week.